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No. 32

# In the Supreme Court of the United States

OCTOBER TERM, 1957

UNITED STATES OF AMERICA EX REL. LEE KUM HOY, ET AL., PETITIONERS

*v.*

JOHN L. MURFF, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## MEMORANDUM FOR THE RESPONDENT IN RESPONSE TO PETITIONERS' MOTION TO STRIKE

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The petitioners have filed a motion to strike the Foreign Service Report on the Problem of Fraud at Hong Kong forwarded to the State Department on December 9, 1955, by Everett F. Drumright, Consul General. Ten copies of this report were filed with the Court by the government at the time it filed its brief (Br. p. 19, fn. 4).[1] The respondent believes that

[1] Although the report was filed on September 25, 1957, the motion to strike was served on the Solicitor General on November 18, 1957, in the very week in which the case is calendared for argument. Thus, the time for response is limited.

the report is proper background material, appropriate for consideration by the Court, and that the motion should be denied.

1. The principal issue in this case, as fixed by order of the Court (R. 430), is whether there was an unconstitutional discrimination against the petitioners. This depends not only on whether blood testing was limited to persons of Chinese ancestry, but, if so, whether there were circumstances justifying such limitation. The circumstances giving rise to the practices followed are, of course, not limited to the facts of the petitioners' own cases; they constitute the climate in which the particular facts of the cases took place. Similarly, in considering the constitutionality or construction of regulatory statutes, the Court has frequently made extensive reference to studies and reports, both official and unofficial, to determine exactly what problem the legislature was seeking to solve. See e. g., *Muller* v. *Oregon*, 208 U. S. 412, 419, fn. 1; *Bunting* v. *Oregon*, 243 U. S. 426; *United States* v. *Carolene Products Co.*, 304 U. S. 144, 150; *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381, 395; *United States* v. *Felin & Co.*, 334 U. S. 624, 637. And see also Brandeis, J., dissenting in *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 280. Cf. *Brown* v. *Board of Education*, 347 U. S. 483, 494, fn. 11. As to whether the particular report was an appropriate one to call to the Court's attention, it is an official document of which the Court may take judicial notice without the necessity of a formal introduction in evidence. *The Apollon*, 9 Wheat. 361, 374; *New York*

*Indians* v. *United States*, 170 U. S. 1, 32; *Jackson* v. *United States*, 230 U. S. 1, 18.

2. The petitioners complain that the report contains unproved charges which they may not test by cross-examination (Motion p. 2). The truth of the facts set forth in the report is not in issue and, strictly speaking, cross-examination to test its accuracy should have been denied even if the report had been produced at the administrative level. Whether or not the situation is accurately portrayed in the report, it still constitutes part of the circumstances in which the practice of administering blood tests was adopted. Wholly apart from the truth or falsity of the facts reported, the report has a direct bearing on whether the use of the tests was motivated by race prejudice or in an attempt to meet fraudulent practices believed to prevail. Petitioners themselves do not hesitate to cite annual reports of the Immigration Service to support their counter argument that the pressures for admission and the use of fraud to procure admission were not limited to applicants of Chinese ancestry (Pet. Reply Brief, p. 8).

3. Petitioners also complain that the report "is replete with unsupported dubious generalities which disclose the racial bias and antagonisms of the author or authors." (Pet. Reply Brief, p. 7.) This is not a fair reading of the report which attempts to support its conclusions with a wealth of detail related in a dispassionate manner. Moreover, it is odd that petitioners should object to its consideration on this ground since the appearance of such bias would di-

rectly support their case. The fact of the matter is that, whatever judgment is made of the report, it is part of the background of the practices followed by the immigration authorities and is appropriate for consideration by the Court.

Respectfully submitted,

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NOVEMBER, 1957.